

STATE OF MICHIGAN
COURT OF APPEALS

SBC MICHIGAN,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee.

UNPUBLISHED

July 12, 2005

No. 251991

MPSC

LC No. 00-013762

Before: Cooper, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Appellant SBC Michigan (“SBC”) appeals as of right from an order of appellee Michigan Public Service Commission (“PSC”), finding that it violated various provisions of the Michigan telecommunications act (“MTA”), MCL 484.2101 *et seq.*, and requiring it to pay fines and restitution. We affirm.

Robert Zakrzewski¹ noticed static on one of two telephone lines in his home. He reported the problem to SBC, and was informed that a service charge could be imposed if a service call was made and the problem was found to be located in the equipment inside his home. Zakrzewski requested that a technician be sent to check SBC’s equipment, and specified that he did not want the technician to check any equipment inside his home. Later that day, Zakrzewski noticed a repair person working on the utility pole outside his home. He checked the telephone, found that the dial tone was clear, and assumed that SBC had dispatched the repair person and that the problem had been corrected.

Zakrzewski’s next bill from SBC included a \$71.00 service charge with the notation “Charges for Changing your Service on Aug 28, 2002 1. Repair Service Call Charge.” He refused to pay the charge, which appeared on two subsequent bills. Zakrzewski switched to another telephone service provider, and received a final bill from SBC for \$58.88 (\$71.00 minus an unrelated credit of \$12.12). He filed an informal complaint with SBC and was told that the charge had been cancelled; nevertheless, several months later, he received a letter from a collection bureau demanding payment of \$58.88 owed to SBC.

¹ Zakrzewski was a named complainant below but is not designated as an appellee in this appeal.

Zakrzewski filed a complaint with the PSC alleging that SBC's actions violated various sections of the MTA, including: Section 502(1)(a), which prohibits a provider of a telecommunication service from making "a statement or representation, including the omission of material information, regarding the rates, terms, or conditions of providing a telecommunication service that is false, misleading, or deceptive," MCL 484.2502(1)(a); Section 502(1)(b), which prohibits a provider from charging "an end-user for a subscribed service that the end-user did not make an initial affirmative order," MCL 484.2502(1)(b); Section 502(1)(d), which requires a provider to confirm in writing an oral order of a residential telecommunication service within fifteen days after the order is placed, MCL 484.2502(1)(d); Section 502(1)(f), which prohibits a provider from disparaging "the services, business, or reputation of another by false or misleading representation of fact," MCL 484.2502(1)(f); and Section 502(1)(h), which prohibits a provider from causing "a probability of confusion or a misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction," MCL 484.2502(1)(h). Zakrzewski sought a credit from SBC in the amount of \$71.00 to show a zero balance due, a refund of the \$12.12 erroneously applied to the \$71.00 charge, reimbursement of postage and copying expenses, and an order directing SBC to cease and desist its unlawful actions.

The PSC granted in part and denied in part Zakrzewski's complaint. The PSC found that SBC's actions did not violate Sections 502(1)(b), 502(1)(d), or 502(1)(f), but concluded that the SBC's notation of the \$71.00 service charge under the heading "Charges for Changing Your Service" constituted a false statement within the meaning of Section 502(1)(a) because SBC neither changed Zakrzewski's service nor performed a repair visit for which he could be charged on August 28, 2002. The PSC emphasized that in the February 25, 2002 order entered in Case No U-13079 ("*Rovas*"),² SBC was directed to refrain from imposing a service charge unless it entered a customer's home and determined that a problem was located in the customer's interior wiring.

The PSC found that SBC violated Section 502(1)(h) by billing Zakrzewski \$71.00 for the service call and ultimately referring the matter to a collection agency. The PSC determined that SBC's act was confusing to Zakrzewski, and was misleading because he was not legally obligated to pay the charge.

The PSC found that SBC violated Section 305(1)(n), MCL 484.2305(1)(n), by failing to comply with the order entered in *Rovas*, *supra*, and refraining from imposing the \$71.00 service call charge without entering Zakrzewski's home to determine that the problem existed in his wiring. The PSC determined that the fact that a violation of Section 305(1)(n) was not pled in the complaint was without moment because the substance of the issue was discussed in the proceedings.

The PSC declined to impose a penalty for SBC's violation of Section 305(1)(n), but imposed a total fine of \$20,000 for the violations of Sections 502(1)(a) and 502(1)(h), see MCL

² *Ameritech Michigan v Pub Service Comm*, Case No. U-13079. The parties refer to this case as the *Rovas* case.

484.2601(a), and required SBC to reimburse Zakrzewski \$1,100.19 for his time and expenses incurred in attempting to resolve the matter.

The standard of review for PSC orders is narrow and well defined. All rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, *prima facie*, to be lawful and reasonable. MCL 462.25; *Michigan Consolidated Gas Co v Pub Service Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). An order is unlawful if the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). An order is unreasonable if it is not supported by the evidence. *Associated Truck Lines, Inc v Pub Service Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966). A final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28.

We give due deference to the PSC's administrative expertise and its construction of regulatory schemes it is empowered to administer, and do not substitute our judgment for that of the PSC. *Attorney General v Pub Service Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999); *Champion's Auto Ferry, Inc v Pub Service Comm*, 231 Mich App 699, 708; 588 NW2d 153 (1998). Whether the PSC exceeded the scope of its authority is a question of law that we review *de novo*. *In re Complaint of Pelland Against Ameritech Michigan*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

Initially, SBC argues that the PSC lacked jurisdiction to find that it violated Section 305(1)(n), which prohibits a provider from performing any act prohibited by the MTA or a Commission order. SBC maintains that *Rovas, supra* was wrongly decided, and cannot serve as the basis for a finding that SBC violated Section 305(1)(n). Finally, SBC asserts that the PSC has no jurisdiction over the inspection and maintenance of inside wiring because the maintenance of such wiring is a deregulated service. We disagree.

The PSC possesses only that authority granted to it by the Legislature. *Attorney General v Pub Service Comm*, 231 Mich App 76, 78; 585 NW2d 310 (1998). The PSC "is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities." MCL 460.6.

In its appeal in *Rovas, supra*, Ameritech challenged the PSC's authority to limit its ability to impose a service charge on an unregulated service, i.e., the maintenance of inside wiring. A panel of this Court determined that the PSC lacked jurisdiction over Ameritech's appeal, and transferred the case to the circuit court. Our Supreme Court reversed and remanded the matter for consideration of Ameritech's appeal, concluding that the PSC's decision was an order fixing Ameritech's practices or services, and that therefore, this Court had jurisdiction over the appeal. *Ameritech Michigan v Public Service Comm*, 468 Mich 905; 661 NW2d 580 (2003). Subsequently, we rejected Ameritech's argument that the PSC exceeded its jurisdiction, affirmed the PSC's February 25, 2002 order, and remanded for clarification. *Ameritech Michigan v Public Service Comm*, unpublished opinion per curiam of the Court of Appeals, issued June 17, 2004 (Docket No. 244742). Based on our Supreme Court's remand order in *Rovas, supra*, we

conclude that the PSC had jurisdiction to make the finding that it did, and that we have jurisdiction over SBC's appeal of the PSC's October 7, 2003 order. See MCL 462.26(1).

Furthermore, SBC's argument that the PSC denied it due process by finding that it violated Section 305(1)(n) when no such violation was alleged in Zakrzewski's complaint is without merit. SBC was aware of the allegation,³ and was not prejudiced by lack of notice via the complaint. Moreover, the PSC did not fine or otherwise penalize SBC for the violation of Section 305(1)(n). *In re Canales Complaint*, 247 Mich App 487, 501-502; 637 NW2d 236 (2001).

Next, SBC argues that the PSC erred by finding that SBC violated Sections 502(1)(a), 502(1)(h), and 305(1)(n). We disagree.

The PSC did not err by finding that SBC violated Section 502(1)(a) by making a statement, i.e., the inclusion of the \$71.00 service charge on Zakrzewski's bill under the heading referring to a change in service, that was false or misleading. The PSC's statement that no telecommunication services were at issue was made in the context of its discussion of the alleged violations of Sections 502(1)(b) and 502(1)(d), and indicated that no subscribed telecommunication services were at issue. A false or misleading statement may relate to a practice or service of a provider. SBC made no change to Zakrzewski's service on August 28, 2002. The evidence showed that on that date a technician went to Zakrzewski's residence and tested SBC's wiring, and found that no problems existed in SBC's equipment. The order entered in *Rovas, supra*, prohibited SBC from imposing a service charge unless it first determined, by entering the customer's residence, that a problem existed in the customer's interior wiring. The technician did not enter Zakrzewski's residence or test his interior wiring on August 28, 2002; therefore, no service call for which SBC was permitted to impose a charge of \$71.00 was made at Zakrzewski's residence on that date. The statement on Zakrzewski's bill was false. No evidence supports a finding that SBC acted with the intent to mislead Zakrzewski. However, we are required to give great weight to the PSC's interpretation of a statute it is empowered to administer. The PSC's conclusion that Section 502(1)(a) allows a finding that a provider made a false and misleading statement in the absence of an intent to defraud is plausible and entitled to due deference. *Champion's Auto Ferry, supra*.⁴

The PSC did not err by finding that SBC violated Section 502(1)(h) by making a statement, i.e., that Zakrzewski had been charged \$71.00 for a service call, that was likely to cause Zakrzewski confusion as to his legal rights and obligations. The evidence showed that Zakrzewski requested that SBC check its own equipment, but indicated that he did not wish to have a technician enter his residence. He was informed that a service charge would be imposed

³ The administrative law judge found that SBC violated Section 305(1)(n), and SBC addressed this finding in its exceptions to the Proposal for Decision.

⁴ This Court employed a similar analysis in the *Rovas* case when upholding the PSC's finding that Ameritech violated Section 502(1)(a). *Ameritech Michigan, supra*, slip op at 2-3. This decision is not precedentially binding, MCR 7.215(C)(1), but we consider it to be persuasive.

if the problem was found to exist in his interior wiring. The problem on Zakrzewski's line apparently resolved itself; however, Zakrzewski assumed that the problem was corrected by the technician he observed working on a utility pole on the same day he reported the problem to SBC. Zakrzewski did not cancel his service request; however, the evidence showed that he was not required to do so. Zakrzewski was unaware that a technician visited his home on August 28, 2002. No service ticket was left at his residence. He first learned that SBC had erroneously assumed that the problem still existed and was located in his interior wiring when he received his bill containing a service charge for a service call he did not know had been made. The PSC's conclusion that SBC's statement caused confusion as to Zakrzewski's rights and obligations was supported by the requisite evidence. Const 1963, art 6, § 28. The PSC's interpretation and application of Section 502(1)(h) is entitled to deference. *Champion's Auto Ferry, supra*.

The PSC did not err by finding that SBC violated Section 305(1)(n) by failing to comply with the order entered in the *Rovas* case and refraining from imposing a service charge until it had entered a customer's residence and determined that a problem was located in the customer's interior wiring. The order was not stayed, and the fact that SBC sought rehearing of the order did not relieve it of the obligation to comply with it. The PSC's conclusion that SBC's failure to comply with the order constituted a violation of Section 305(1)(n) was reasonable and entitled to deference. *Champion's Auto Ferry, supra*.

Finally, SBC argues that the PSC erred by awarding restitution to Zakrzewski to compensate him for his time as well as copying and postage expenses.⁵ SBC maintains that even assuming that a violation of the MTA occurred, no evidence showed that Zakrzewski suffered an economic loss. He was retired and did not suffer a loss of income during the time he pursued the complaint. We disagree.

The PSC may "order remedies and penalties to protect and make whole ratepayers and other persons who have suffered an economic loss as a result of" a violation of the MTA. MCL 484.2601. The PSC interprets its authority to act to "make whole" a complainant who has established a violation of the MTA as allowing it to award monetary compensation for time spent attempting to resolve the dispute, and does not require a complainant to demonstrate that he sustained a loss of wages while attempting to resolve a dispute with a provider. This interpretation is reasonable, and is entitled to deference. *Champion's Auto Ferry, supra*. The evidence showed that Zakrzewski spent forty hours attempting to resolve his dispute with SBC, that the compensation rate of \$25.00 per hour was less than he earned when he was working, that he incurred costs in the amount of \$83.81 for copying and postage, that he never received a refund check in the amount of \$16.38 purportedly sent to him by SBC, and that SBC's records did not reflect that he ever cashed such a check. The PSC's award of \$1,100.19 as restitution to Zakrzewski was supported by the requisite evidence. Const 1963, art 6, § 28.

⁵ SBC does not specifically challenge the PSC's imposition of fines totaling \$20,000 for its violations of Sections 502(1)(a) and 502(1)(h), but states generally that no violations of the MTA occurred. For the reasons stated above, we conclude that SBC violated Sections 502(1)(a) and 502(1)(h), and that the PSC correctly imposed fines for those violations. MCL 484.2601(a).

Affirmed.

/s/ Jessica R. Cooper

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra